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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-366

No. COA21-354

Filed 17 May 2022

North Carolina Industrial Commission, IC No. 18-017149

STANLEY SPENCER, Plaintiff,

v.

GOODYEAR TIRE & RUBBER CO., Employer; LIBERTY INSURANCE CORP., Carrier, Defendants.

Appeal by Defendant from Opinion and Award entered 2 March 2020 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 January 2022.

Lennon, Camak, & Bertics, PLLC, by Michael W. Bertics and S. Neal Camak, for plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Matthew J. Ledwith, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Goodyear Tire and Rubber Co. (Goodyear) and Liberty Insurance Corp. (collectively Defendants) appeal from an Opinion and Award entered by the Full Commission of the North Carolina Industrial Commission (Commission) concluding

Stanley Spencer (Plaintiff) suffered an occupational disease and granting Plaintiff's claim for compensation under the Worker's Compensation Act. The Record tends to reflect the following:

¶ 2 Plaintiff began working on Goodyear's production line in 2011. In 2012, Plaintiff transitioned to working the 430-5111 Production Service-Tuber Line position (the Position). The written job description for the Position stated the job required frequent pulling with up to eighty-five pounds of force, sometimes at shoulder height; occasional gripping with up to forty pounds of force; and occasional lifting and carrying of up to fifty-five pounds. Plaintiff's primary responsibility within the Position was to grab the top slab of rubber from a nearby skid stacked with rubber and feed it into the machine that cuts treads into the tires. Once Plaintiff fed the top slab of rubber into the machine, the machine was supposed to automatically pull the rest of the slabs off the skid. Before the skid was empty, Plaintiff would feed the top slab of rubber from the next skid into the machine so as not run out of rubber. On a typical day, Plaintiff would empty thirty to fifty skids with rubber stacked to the height at or above Plaintiff's shoulder level.

¶ 3 Before Plaintiff received the skids of rubber, the rubber slabs were run through a "slurry" mixture intended to prevent the slabs from sticking together. However, even with the slurry, a single slab of rubber weighs around forty to fifty pounds, requiring Plaintiff to exert himself when pulling the rubber into the machine.

Furthermore, approximately one out of five or six skids did not have the appropriate amount of slurry, causing the rubber to stick together and requiring Plaintiff to exert even more force to break it free. Occasionally, Plaintiff would not be able to get the rubber slab loose and he would have to send the rubber back for slurry re-application.

¶ 4 On 21 April 2018, Plaintiff was working in his regular position when he came across a stuck slab. He attempted to pull the slab off with both hands to unstick the rubber when he felt a pop in his left shoulder, resulting in immediate pain. Prior to this incident, Plaintiff had not experienced any pain or other symptoms in, nor sought medical treatment for, either shoulder. Plaintiff reported the incident to his manager and completed Goodyear's Associate Report of Incident Form and Goodyear Associate Statement of Work-Related Incident. Plaintiff then reported to Goodyear's occupational health department where he was seen by Dr. Mario Perez-Montez.

¶ 5 On 21 May 2018, Plaintiff obtained an MRI of his left shoulder and was subsequently referred by Dr. Perez-Montez for an orthopedic consult with Dr. Christopher Barnes of Fayetteville Orthopedics. Dr. Barnes saw Plaintiff on 18 June 2018 and diagnosed Plaintiff with a sprain of his left rotator cuff, partial thickness tear, and long head biceps tendinitis/instability. Without evidence of a tear in the rotator cuff, Dr. Barnes recommended Plaintiff continue "conservative" treatment, which consisted of "nonnarcotic oral analgesics, physiotherapy and modified work duties."

¶ 6 Ultimately, when Plaintiff's symptoms did not resolve, Dr. Barnes recommended shoulder surgery. Based on this recommendation, on 19 July 2018, Plaintiff filed a Notice of Accident to Employer and Claim of Employee (Claim) claiming he suffered injury by accident, or in the alternative, a cumulative trauma disorder and seeking to have Goodyear cover the costs of the surgery and associated loss of work. Goodyear denied the Claim on 20 August 2018, opining Plaintiff "did not sustain an occupational/compensable injury arising out of and in the course and scope of his employment." In response, Plaintiff filed a Request that Claim be Assigned for Hearing on 12 September 2018.

¶ 7 Despite Goodyear's denial of Plaintiff's Claim, Plaintiff underwent surgery on 25 September 2018 using his private insurance to cover the cost. During surgery, Dr. Barnes discovered the rotator cuff was not torn, but the biceps tendon was surrounded in scar tissue next to the rotator cuff. Dr. Barnes also discovered Plaintiff had osteoarthritis in his shoulder which had caused two bone spurs to develop. Dr. Barnes removed the scar tissue, repaired the biceps tendon, and removed the two bone spurs. After the surgery, Dr. Barnes diagnosed Plaintiff with bursitis, biceps tendinitis, and osteoarthritis of the left shoulder and recommended Plaintiff complete a course of physical therapy. Plaintiff was out of work for several months recovering from the surgery, and finally returned to his Position on 4 March 2019.

¶ 8 After returning to work, Plaintiff continued to experience shoulder pain, and on 9 April 2019, Plaintiff saw Dr. Kevin Speer, an orthopedic surgeon, for a second opinion. Dr. Speer conducted another MRI which revealed that Plaintiff had a full-thickness tear indicating "his pathology had advanced." Dr. Speer recommended a revision surgery, which he performed on 25 May 2019.

¶ 9 A few days before Plaintiff's second surgery, on 20 May 2019, Plaintiff's Claim came on for hearing before a Deputy Commissioner. The Deputy Commissioner heard testimony from both Dr. Barnes and Dr. Speer. Dr. Barnes testified the biceps injury and the osteoarthritis were two separate issues, but the biceps injury "was causing the majority of the pain." He further opined the presence of the degeneration in the shoulder did not contribute to the biceps issue because "it's separate enough in the shoulder that it really would not impinge, or you know, do anything to affect the course of the biceps tendon." Furthermore, he testified the biceps injury was caused by an acute event—not a chronic condition.

¶ 10 Dr. Speer testified the resulting shoulder problems were likely a "combination of him having some degenerative pathology from the job in that shoulder, combined with him pulling on [the] stuck rubber" the day of the accident. When questioned about whether the demands of Plaintiff's job, more likely than not, contributed to the development of the various conditions found in his shoulder by Dr. Barnes, Dr. Speer further explained:

> [T]he demands of his job caused a lot of degenerative wear and tear in his shoulder, resulting in the bone spurs and maybe some degree of biceps pathology, but the biceps tendon instability was probably caused by an event, a moment, some - - some strain that thereafter his shoulder is uniquely more painful than it had been in the past.

¶ 11 On 2 March 2020, the Deputy Commissioner entered an Opinion and Award in Defendant's favor. Based on the testimony, exhibits, and depositions filed in the claim, the Deputy Commissioner made the following pertinent Findings of Fact:

> 16. As Dr. Barnes testified, the biceps tendon pathology was "what drove the bus" in his treatment of Plaintiff. . . . To Dr. Barnes, the osteoarthritis was an incidental finding during the surgery.
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> 23. Drs. Barnes and Speer agreed that the April 21, 2018 incident was an acute event that injured Plaintiff's left biceps tendon.
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> 24. As Dr. Barnes testified, the arthritic component in Plaintiff's left shoulder that he addressed during his September 25, 2018 surgery was not a traumatic condition. As he further testified, the biceps tendon pathology in Plaintiff's left shoulder was the condition that was causing the majority of Plaintiff's pain, and it was not in close physical proximity to the degenerative arthritic condition in the shoulder. As Dr. Barnes further testified, the degenerative arthritic condition in Plaintiff's left shoulder had not contributed at all to making the shoulder more prone to sustaining the traumatic biceps tendon injury.
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> 25. . . . Dr. Barnes did not believe that Plaintiff's job requirements placed him at an increased risk for developing arthritis in his left shoulder, and this was a specific point of disagreement between him and Dr. Speer.
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> 26. As Dr. Speer testified, the bone spurs that Dr. Barnes found were chronic, and he (Dr. Speer) believed that Plaintiff's job

> duties had conferred a lot of increased stress on Plaintiff's left shoulder, which could have caused the bone spurs to form through an arthritic process.
>
> 27. As Dr. Speer testified, in reviewing Dr. Barnes' records, Dr. Speer noted that the arthritis-related bone spurs about the acromioclavicular joint in Plaintiff's left shoulder (which bone spurs Dr. Barnes excised during his September 25, 2018 surgery) could have caused an impingement upon the biceps tendon, which runs just beneath the acromion bone. As Dr. Speer further testified, repetitive motions with the shoulder engaged in reaching out in front, reaching overhead, and/or engaging in forceful activities, could result in the biceps tendon pathology that Plaintiff suffered.
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> 30. As Dr. Speer further testified, the acute event that happened on April 21, 2018 was caused by a combination of the pre-existing degenerative pathology that Plaintiff had in his left shoulder combined with the occurrence of Plaintiff forcefully pulling on the stuck rubber. As Dr. Speer noted, the presence of the bone spurs in Plaintiff's left shoulder made him more susceptible to sustaining the acute injury of the biceps tendon tear. Essentially, to Dr. Speer, this was an acute injury superimposed upon a degenerative condition.

¶ 12 Consequently, the Deputy Commissioner concluded:

> 1. . . . [E]ven assigning more weight to the testimony of Dr. Speer than to that of Dr. Barnes, the undersigned cannot conclude that Plaintiff's left shoulder condition is compensable as an occupational disease. N.C. Gen. Stat. § 97-53(13).
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> 2. The fatal flaw in Plaintiff's occupational disease theory is that he did not have any symptoms in his left shoulder before the occurrence of the April 21, 2018. The cases that have found a condition (other than a back condition) compensable in the scenario of an acute occurrence overlying and being contributed to by an underlying degenerative process (a "straw that broke the camel's back" scenario) seem to require that the claimant have

> had a preacute-occurrence history of symptoms related to the underlying process. As Plaintiff had no such history, the undersigned must conclude that Plaintiff's left shoulder condition is not compensable under an occupational disease theory. . . .
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> . . . .
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> 4. As an alternative to his occupational disease theory, Plaintiff contends that the April 21, 2018 stuck-rubber-pulling incident constituted an injury by accident and is compensable as such. However, the undersigned must find, based on the preponderance of the evidence in view of the entire record, that Plaintiff's pulling on the rubber to get it unstuck did not constitute an "accident" within the meaning of the North Carolina Workers' Compensation Act. N.C. Gen. Stat. § 97-2(6).
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> 5. "It is . . . clear from the cases that once an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee's normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an 'injury by accident' under the Workers' Compensation Act." *Bowles v. CTS of Asheville, Inc.*, 77 N.C. App. 547(1985) (citations omitted). In the instant claim, although stuck rubber was not a designed part of the process (and indeed the slurry was applied specifically to try to prevent it from happening), Plaintiff nonetheless encountered stuck rubber on 16 to 20 percent of the skids he processed and had to jerk on it to get it unstuck. Thus the undersigned concludes that jerking on the stuck rubber to unstick it had become a routine part of Plaintiff's job long before the occurrence of the April 21, 2018 incident.
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> 6. As such, the undersigned must conclude that Plaintiff's left shoulder condition is not compensable in this claim, either as an occupational disease or as an injury by accident.

Therefore, the Deputy Commissioner denied Plaintiff's claim. Plaintiff filed Notice of Appeal to the Full Commission on 13 March 2020.

¶ 13 On 25 February 2021, "ha[ving] reviewed the prior Opinion and Award based upon the record of the proceedings before Deputy Commissioner Harris, . . . and the briefs and arguments of the parties[,]" the Commission entered its Opinion and Award "pursuant to N.C. Gen. Stat. § 97-85." The Commission made the following relevant Findings of Fact:

> 20. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that on April 21, 2018 Plaintiff did not sustain an injury by accident as he was performing his regular duties in their usual and customary manner. The Full Commission further finds that even through the top fold of the rubber was stuck to a lower fold at the time Plaintiff felt his shoulder pop, this was not an unusual condition, as it occurred on a significant percentage of the skids of rubber Plaintiff dealt with daily.
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> 21. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's injury on April 21, 2018 was the result of an occupational disease, specifically degenerative conditions in Plaintiff's left shoulder which became symptomatic when Plaintiff experienced a left shoulder sprain and/or other injury to his left shoulder biceps tendon. In reaching this finding, the Full Commission assigns greater weight to the testimony of Dr. Speer. Both Dr. Speer and Dr. Barnes testified that Plaintiff's job exposed Plaintiff to a greater degree of stress in his shoulders tha[n] the general population, resulting in a greater degree of wear and tear. Dr. Speer testified that this additional wear and tear resulted in Plaintiff developing bone spurs in his left shoulder that led to ligament damage, which destabilized Plaintiff's left biceps tendon. Although Plaintiff's April 21, 2018 injury to his left shoulder appeared to be an acute incident, it was caused by the large amount of stress on Plaintiff's shoulders inherent in Plaintiff's job and not present in the general population. As such,

> Plaintiff developed a chronic occupational disease, which became symptomatic on April 21, 2018.
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> 22. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff was disabled as a result of a compensable occupational disease. The Full Commission finds that following Plaintiff becoming symptomatic for his compensable occupational disease on April 21, 2018, no evidence has been produced that Plaintiff has reached maximum medical improvement. . . .

Consequently, the Commission concluded:

> 2. In the present case, Plaintiff has failed to establish that "an unlooked for and untoward event" occurred on April 21, 2018, as Plaintiff testified that he was performing his job in his regular routine of work. Although Plaintiff did testify that he was injured while attempting to unstick the top fold of rubber on a skid, Plaintiff testified that this was a common occurrence that he had reported to management for over five years. Therefore, Plaintiff has not met his burden to show that he suffered an injury by accident on April 21, 2018.
>
> 3. In the present case, Plaintiff produced competent medical testimony that his position at Goodyear exposed him to additional stress on his shoulder that placed Plaintiff at greater risk of developing the shoulder injuries that he sustained than the general public. Although Plaintiff's left shoulder injuries, including the degenerative development of bone spurs and damage to the left shoulder tendons are diseases to which the general public is exposed, Dr. Speer testified that Plaintiff's work exposed him to a greater risk of contracting both of these diseases, and Dr. Barnes testified that Plaintiff's work exposed him to a greater risk of injury to his shoulder tendons. Dr. Speer testified that Plaintiff's left shoulder degenerative issues, which caused friction between the bone spurs and ligaments supporting Plaintiff's left shoulder tendons, were caused by wear and tear and became symptomatic as a result of the left shoulder sprain Plaintiff sustained on April 21, 2018. Plaintiff has established by

> the preponderance of the evidence that Plaintiff' employment exposed him to a greater risk of degenerative wear and tear to his shoulders, above that seen in the general public, and that but for Plaintiff's shoulder strain on April 21, 2018, Plaintiff would not have become disabled. Therefore, Plaintiff has a compensable occupational disease in his left shoulder, namely degenerative wear and tear resulting in the development of bone spurs and the partial tears of the biceps tendon and supraspinatus tendon. N.C. Gen. Stat. § 97-53(13) (2019).

Therefore, the Full Commission entered an award in Plaintiff's favor. Defendant timely filed written Notice of Appeal from the Full Commission's Opinion and Award to this Court on 29 March 2021.

Issues

¶ 14 The issues on appeal are whether: (I) the Commission erred in concluding Plaintiff did not suffer a compensable injury by accident; and (II) the Commission erred in concluding Plaintiff suffers from a compensable occupational disease.

Analysis

I. Compensable Injury by Accident

¶ 15 As an alternative basis for affirming the award of benefits, Plaintiff contends the Plaintiff suffered a compensable injury by accident because Plaintiff's shoulder injury resulted in significant part from him pulling stuck rubber from a skid, and the stuck rubber is an unintended or untoward event.

¶ 16 For an injury to be compensable, the "claimant must prove three elements: (1) That the injury was caused by accident; (2) that the injury arose out of the

employment; and (3) that the injury was sustained in the course of employment." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977) (citations omitted). In this case, the parties do not dispute Plaintiff's injury arose out of the employment and that the injury was sustained in the course of employment. However, Plaintiff contends the Commission erred in concluding the injury was not caused by an accident.

¶ 17 An injury by accident is "an unlooked for or untoward event which is not expected or designed by the person who suffers the injury. The elements of an accident are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Shay v. Rowan Salisbury Sch.*, 205 N.C. App. 620, 624, 696 S.E.2d 763, 766 (2010) (citations omitted). However, "[o]nce an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee's normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an 'injury by accident' under the Workers' Compensation Act." *Bowles v. CTS of Asheville*, 77 N.C. App. 547, 550, 335 S.E.2d 502, 504 (1985) (citations omitted).

¶ 18 Here, the Commission concluded:

> . . . In the present case, Plaintiff has failed to establish that "an unlooked for and untoward event" occurred on April 21, 2018, as Plaintiff testified that he was performing his job in his regular routine of work. Although Plaintiff did testify that he was injured while attempting to unstick the top fold of rubber on a skid, . . .

> this was a common occurrence that he had reported to management for over five years. Therefore, Plaintiff has not met his burden to show that he suffered an injury by accident on April 21, 2018. N.C. Gen. Stat. § 97-2(6) (2019). *See also Swindell v. Davis Boat Works, Inc.*, 78 N.C. App. 393, 396, 337 S.e.2D 592, 594 (1985) ("There must be some new circumstance not a part of the usual work routine in order to find that an accident has occurred.").

The Commission's Finding that even though the top fold of the rubber was stuck to a lower fold at the time Plaintiff felt his shoulder pop, this was not an unusual condition, as it occurred on a significant percentage of the skids of rubber Plaintiff dealt with daily, and thus had become part of Plaintiff's normal work routine, supports the Commission's Conclusion the incident in question did not constitute an unlooked for or untoward event. Moreover, the testimony during the hearing supports this Finding, as Plaintiff testified, on 21 April 2018, he was performing his job in his regular routine of work, and the top slab of rubber being stuck was not unusual, as it would be stuck on every fifth or sixth skid. Thus, the Commission's Findings support its Conclusion Plaintiff's injury was not the result of an accident, and therefore, the Commission did not err in concluding Plaintiff did not suffer a compensable injury under the Workers' Compensation Act.

II. Compensable Occupational Disease

¶ 19 Defendants contend the Commission erred in awarding Plaintiff's Claim because the Findings of Fact do not support a Conclusion that Plaintiff's employment

was a significant causal factor in his disease's development, and thus, do not support the Conclusion Plaintiff suffers from a compensable disease under the Workers' Compensation Act.

¶ 20 "Our standard of review for a Commission's opinion and award is limited to whether the Commission's findings of fact support its conclusions of law. Where the competent evidence supports the Commission's findings, those findings are binding on appeal." *Aldridge v. Novant Health, Inc.,* 2021-NCCOA-651, ¶ 13. "Thus, on appeal, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation omitted). We review the Commission's conclusions of law de novo. *McRae v. Toastmaster Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

¶ 21 An occupational disease is:

> [a]ny disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

N.C. Gen. §97-53(13) (2021). Thus, "[f]or an occupational disease to be compensable under N.C.G.S. § 97-53(13) it must be (1) characteristic of persons engaged in the particular trade or occupation in which the plaintiff is engaged; (2) not an ordinary

disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be a causal connection between the disease and the plaintiff's employment." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 612, 636 S.E.2d 553, 555 (2006) (citation and quotation marks omitted).

¶ 22 "To satisfy the first and second elements it is not necessary that the disease originate exclusively from or be unique to the particular trade or occupation in question." *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 93-94, 301 S.E.2d 359, 365 (1983) (citation omitted). Rather, "the first two elements are satisfied if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally." *Id.*

¶ 23 To satisfy the third element, the plaintiff must prove the employment "significantly contributed to, or was a significant causal factor in, the disease's development. This is so even if other non-work-related factors also make significant contributions or were significant causal factors." *Rutledge*, 308 N.C. at 101-102, 301 S.E.2d at 369-370. Thus, "[t]he factual inquiry, in other words, should be whether the occupational exposure was such a significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work." *Id.*

¶ 24 Here, although Defendants argue Plaintiff has not provided competent medical evidence to satisfy the first two elements of occupational disease, Defendants also

concede Plaintiff provided testimony his employment placed him at a greater risk of developing bone spurs than the general public. Thus, the crux of Defendants' argument is Plaintiff did not provide competent medical evidence the bone spurs significantly contributed to the physical disability, namely the biceps tear and ensuing shoulder issues, which resulted in Plaintiff's inability to work.

¶ 25 On this issue, the Commission concluded in Conclusion Four (4):

> but for Plaintiff's shoulder strain on 21 April 2018, Plaintiff would not have become disabled. Therefore, Plaintiff has a compensable occupational disease in his left shoulder, namely degenerative wear and tear resulting in the development of bone spurs and the partial tears of the biceps tendon and supraspinatus tendon.

However, in so concluding, the Commission applied the wrong legal standard. The standard for an occupational disease is not whether an employee would not have been disabled "but for" a single injury. Rather, the test is whether "the occupational exposure was such a significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work." *Id.*

¶ 26 Moreover, although the Opinion and Award recites Dr. Speer's testimony "that Plaintiff's left shoulder degenerative issues . . . caused friction between the bone spurs and ligaments supporting Plaintiff's left shoulder tendons," the Commission fails to include a definitive determination as to whether the bone spurs significantly contributed to Plaintiff's shoulder issues. *See Lane v. Am. Nat'l Can Co.*, 181 N.C.

App. 527, 640 S.E.2d 732 (2007) (citations omitted) ("This Court has long held that findings of fact must be more than a mere summarization or recitation of the evidence and the Commission must resolve the conflicting testimony."). Therefore, the case must be remanded for application of the correct test and for entry of such necessary findings.

Conclusion

¶ 27 Accordingly, for the foregoing reasons, we affirm the Commission's conclusion Plaintiff did not suffer an injury by accident and vacate and remand the Opinion and Award for the Commission to make further findings on the issue of whether Plaintiff suffered occupational disease.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges DIETZ and INMAN concur.

Report per Rule 30(e).